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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant

v.

THEODORE B. OLSON, *et al.*

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR EDWARD H. LEVI, GRIFFIN B. BELL, AND WILLIAM FRENCH SMITH AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

This case concerns the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. The amici are former Attorneys General of the United States, who presided over the Department of Justice, respectively, at the time when an Independent Counsel statute similar to the current provisions was first considered by Congress; at the time when the predecessor of the current provisions was first enacted; and at a time when the Independent Counsel provisions were frequently invoked. Accordingly, the amici are acquainted with the practical effects of the Independent Counsel provisions on the operations of the Executive Branch, and they have a continuing interest in the questions presented in this case.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

When the Framers designed the separation of powers, they determined that no official would exercise power unless subject to an institutional check. On the most practical level, the Independent Counsel provisions are inconsistent with this determination. The extraordinary isolation of the Independent Counsel from the Executive Branch, in our judgment, creates the potential of both a significant disruption of the Executive Branch and a threat to individual liberty.

A. Every criminal prosecutor exercises great power over the individuals involved. In addition, a criminal prosecution can affect other important government interests. Because most prosecutorial decisions cannot be reviewed by a court, the principal checks on the prosecutor are those supplied by the Executive Branch itself. The Independent Counsel provisions effectively isolate the Independent Counsel from the Executive Branch, thereby leaving the Independent Counsel free from institutional restraints throughout much of her task—precisely the condition that the Framers sought to avoid.

B. An Executive Branch prosecutor operates within a network of intra-Branch checks and balances. Because a prosecutor within the Executive Branch must accommodate the competing priorities and responsibilities of the Branch, he or she will sometimes have to subordinate a particular prosecution to the government's interest in pursuing other prosecutions, to the government's long-term interest in the development of the criminal law, or to the interests of other Departments in the Executive Branch.

These internal checks and balances are the direct result of the Framers' decision to establish a unitary Executive Branch. They function precisely as the Framers intended the system of checks and balances to function: they prevent a prosecutor from being overtaken by an excess of zeal or ambition, or by the loss of perspective caused by too narrow a focus on one case.

The Independent Counsel is isolated from the Executive Branch; consequently, these internal checks and balances are absent in her case. Not only does this potentially endanger the liberties of the individuals subject to investigation; in addition, it disrupts the operations of the Executive Branch by preventing effective coordination between those involved in the investigation of high government officials and those responsible for the many other important functions of the government.

C. Contrary to the suggestion of appellant and her supporting amici, the Independent Counsel provisions do not provide for the effective control of the Independent Counsel by the Attorney General in ways that would avert these dangers. By the same token, however, Congress can, if it wishes, invoke alternative devices, provided by the Constitution, that ensure the independence of a prosecution from improper influence without compromising the values that the separation of powers is designed to serve.

ARGUMENT

THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE INCONSISTENT WITH THE CONSTITUTIONAL SEPARATION OF POWERS.

This case presents the question whether the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. 49, 591 *et seq.*, violate various Clauses of the Constitution relating to the separation of powers. The Court has, in the past, not hesitated to resolve such questions on the basis of the clear limits established by the Constitution. See, *e.g.*, *Bowsher v. Synar*, 106 S.Ct. 3181 (1986); *INS v. Chadha*, 462 U.S. 919 (1983). In this case, as well, the Appointments Clause and other provisions may provide a clear answer to the questions presented. But when the Court determines that the clear commands of the Constitution are not dispositive, it resolves such separation of powers issues in light of practical realities—in this case, the practical realities of how the Independent Counsel provisions operate. "The men

who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

To the extent the Court's resolution of the questions presented here is informed by such practical considerations, the issues in this case are, therefore, whether the Independent Counsel provisions are "unduly disruptive of the Executive Branch" (*Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977); see, *e.g.*, *Buckley*, 424 U.S. at 122) and whether those provisions weaken the constitutional system of checks and balances in a way that jeopardizes the rights of individuals. It is our judgment that the extraordinary isolation of the Independent Counsel from the Executive Branch creates the potential of both a significant disruption of the Executive Branch and a threat to individual liberty.

A. Introduction

When the Framers designed the separation of powers, they were not concerned principally with venality or rank favoritism. They were instead concerned with excesses of what might otherwise be admirable qualities, such as ambition and zeal. The remedy they prescribed was to ensure that no government official would have free rein in the exercise of power. Every official was to be held in check by another official or another branch of government that had a different constituency and different priorities.[2] In this way, "ambition [would] be made to counteract ambition" (*The Federalist* No. 51 (Madison) at 322 (C. Rossiter ed. 1961)) and the natural tendencies of those who held power—tendencies that would be dangerous if left unchecked and unbalanced—could instead be harnessed for the common good. See *The Federalist* No. 51 (Madison); see also *id.*, No. 10 (Madison) at 78-84; *id.*, No. 15 (Hamilton) at 111; *id.*, No. 48 (Madison) at 309; *id.*, No. 72 (Hamilton) at 436-440.

[2] See, e.g., *The Federalist* No. 51 (Madison) at 322 (C. Rossiter ed. 1961): "[T]he constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other —that the private interest of each individual may be a sentinel over the public rights."

Nowhere in government are these checks and balances more imperative than in the conduct of a criminal investigation. The ultimate checks on the power of the prosecutor are, of course, the authority of the court to dismiss a prosecution, and the authority of the jury to acquit. But as this Court has often recognized, the prosecutor exercises great power in ways that are not, and properly cannot be, subject to judicial control. See, *e.g.*, *Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124, 2137 (1987).

In particular, throughout a criminal investigation, the prosecutor must make many significant decisions that cannot be effectively reviewed by a court but that have a dramatic impact on the lives of individuals. The prosecutor must determine, for example, when to seek a search warrant; when to seek to engage in electronic surveillance; when to subpoena documents; when to call witnesses before a grand jury; whom to immunize; and whom to threaten with prosecution. Each of these decisions is but one of many that a prosecutor will make. But for the individual whose privacy is invaded, whose affairs are disrupted, and who is subjected to extraordinary emotional distress, these are likely to be the most significant decisions that any government official ever makes.

The prosecutor must also decide on the public statements that are to be made during the course of the investigation. Especially in a case involving a high government official, the pressure to make such statements will be great. A prosecutor's public statements can have a profound impact on an individual's reputation. Moreover, the harm that an alleged suspect suffers from such publicity will often persist no matter how completely the individual is exonerated.

Then the prosecutor must decide how long to continue the investigation. Often an investigation will not conclusively determine the guilt or innocence of an individual, and the prosecutor can always find ways to invest more resources and seek more evidence. Finally, of course, the prosecutor must decide whether to seek an indictment.

These decisions, too, can impose enormous burdens on entirely innocent individuals. As Justice Jackson, then Attorney General, stated: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."[3] A person who is the target of a prolonged investigation before being exonerated, or a defendant who prevails at trial, is subject to financial, emotional, and reputational burdens that few members of our society are ever required to endure. "Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young*, 107 S. Ct. at 2141.

Of necessity, however, these decisions cannot be subject to an effective judicial check. That is because, as the Court has often recognized, nearly all of the many decisions that a prosecutor makes are highly discretionary. They require the exercise of judgment on the basis of many complex factors, and they cannot be reduced to a formula or an objective standard of the kind that courts can apply. See, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 607-608 (1985); *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985). Courts cannot review these prosecutorial decisions, and they have properly refrained from doing so.

Nor, of course, can prosecutorial decisions properly be subject to a check by Congress. Congress cannot be, and ought not be, concerned with the details of particular

[3] *The Federal Prosecutor*, Address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, at 2. We have reprinted a copy of this address as an appendix to this brief.

cases, especially particular criminal prosecutions. As the Framers recognized when they adopted the Bill of Attainder Clause, congressional concern with specific allegations and specific defendants is a prime potential source of serious abuse.

It follows that the only practical, realistic check on a prosecutor's power—a power comparable to that exercised by few others in our system—is the Executive Branch itself. At bottom, the choice is between, on the one hand, allowing a prosecutor to wield great power essentially unchecked; and, on the other hand, subjecting the prosecutor, in some degree, to the internal controls of the Executive Branch and the President's ultimate accountability to the people as a whole. There can be little doubt that the Framers, who well understood the danger of unchecked, discretionary law enforcement power, would choose the latter course.

Another dimension of the problem is equally important. A criminal prosecution does not just affect the interests of the individuals who are subject to it; it affects the interests of the Executive Branch as a whole. A mishandled prosecution can "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions" (*Nixon v. Administrator*, 433 U.S. at 443). It can disrupt the government's overall law enforcement priorities and jeopardize other law enforcement efforts; it can also interfere with Executive Branch responsibilities outside the area of law enforcement, including the President's responsibility for national security and foreign affairs.

It would be folly to entrust an enterprise that is so sensitive and so difficult to a single individual who comes new to the task, who is essentially free of all supervision, and who has no institutional connection to the officials responsible for the many other constitutional responsibilities of the Executive Branch. It would be even worse to place such an individual in a position that

creates artificial incentives to prosecute a target with unusual zeal. But that is, in essence, what the Independent Counsel provisions do.

Some of those present at the Constitutional Convention argued against centralizing executive power under a single President; Mr. Randolph, for example, urged that in order to preserve "independence," the execution of the law should be entrusted not to a single President but to three individuals. I Farrand, The Records of the Federal Convention of 1787 at 66 (rev. ed. 1937). But the Framers rejected those arguments. Instead, they accepted James Wilson's view that unifying executive power, far from being a threat to liberty and good government, "would be the best safeguard against tyranny." *Ibid.* On the most practical level, the operation of the Independent Counsel provisions bears out the wisdom of the Framers' decision.

B. The Insulation of the Independent Counsel Disrupts the Executive Branch and Creates a Potential Threat to Individual Liberty.

In numerous ways, the isolation of the Independent Counsel threatens both individual liberty and the integrity of the Executive Branch.

1. a. A prosecutor in the Department of Justice operates within a network of internal—intra-Department and intra-Executive Branch—checks and balances. First, of course, every Department of Justice prosecutor must answer to a superior: an Assistant United States Attorney to the United States Attorney; the United States Attorney to the Attorney General; the Attorney General, ultimately, to the President. But on the day-to-day level, other, less formal, checks and balances are also very important. For example, in the course of an investigation or prosecution, a Department of Justice prosecutor must routinely take into account the interests of other prosecutors, of law enforcement officials, and of officials outside of the Department. A prosecutor will often have to

accommodate or subordinate the pursuit of a particular prosecution to these competing interests.

For example, United States Attorneys are responsible for all federal criminal prosecutions (and, for that matter, all federal civil litigation) within their District—not just for one case and one or a few defendants. Thus, the pursuit of any one prosecution will have to be accommodated to the other priorities of the office. Similarly, a Department of Justice prosecutor may have to abandon an effort to press for an expansive interpretation of a federal criminal statute because that effort conflicts with what the Criminal Division of the Department of Justice, or the Solicitor General's Office, sees as the broader long-term interests of the federal government. In addition, a Department of Justice prosecutor may have to subordinate the interest in pursuing a criminal prosecution to the interests of agencies outside the area of law enforcement. For example, a criminal investigation may have to be shaped in a certain way, abandoned, or not pursued in the first place because it implicates important concerns in the areas of foreign affairs and national security.

These internal checks and balances are the direct result of the fact that a Department of Justice prosecutor operates within the Executive Branch. Because of the diverse responsibilities of the Executive Branch, the prosecutor must constantly establish and reassess priorities. Neither the prosecutorial function nor any single prosecution can grow too large. If it threatens to, the competing priorities of the Executive Branch will assert themselves.

In this way, the checks and balances we have described serve the very role that the Framers envisioned for the system of checks and balances: they force a prosecutor to consider different perspectives and to accommodate competing interests. They guard against the dangers that are endemic in any government—not the dangers of cor-

ruption or gross abuse, which are rare, but the everyday danger that a prosecutor will become too close to a case and will lose perspective The most admirable and dedicated prosecutor may exaggerate the importance of a case and underestimate its potential to interfere with other important government interests and with the lives of the individuals affected. Indeed, the danger may be particularly great in the case of the most dedicated prosecutors.

Because of the intra-Executive Branch controls to which Department of Justice prosecutors are subject, any such prosecutor will soon be brought up short by a law enforcement agent who does not share the same zeal and who has other responsibilities; by an official of another Executive Branch Department who can appeal to higher authority if the prosecutor does not give sufficient weight to that Department's interests; by another prosecutor who objects to the diversion of resources from other prosecutions; by another Department of Justice official who recognizes that single-minded focus on one case can jeopardize the government's long-term interest in the development of the law; by a supervisor who will point out the prosecutor's excesses; or just by the need to move on to another case on an overcrowded docket.

b. These institutional restraints are absent in the case of the Independent Counsel. The Independent Counsel has no day-to-day supervisor and, as we will discuss below, the Attorney General's (and therefore the President's) authority over her is extremely limited. Consequently, the Independent Counsel is not accountable to any official who has responsibility for a broad range of Executive Branch operations.

In addition, unlike a United States Attorney, who has responsibility for an entire federal district, the Independent Counsel has responsibility for only a single matter. Every attorney in the Office of the Independent Counsel is engaged in some way in the prosecution of the

same, single case. Moreover, the Independent Counsel provisions specify that the Department of Justice "shall," upon request, provide the Independent Counsel with "the resources and personnel necessary to perform such independent counsel's duties." 28 U.S.C. 594(d). Thus, the Independent Counsel can requisition a team of law enforcement officers who have no competing responsibilities. In all of these ways, the Independent Counsel essentially escapes the condition that shapes the environment of every other prosecutor—the need to determine and reassess priorities in a setting characterized by competing interests and demands.

The result is the institutionalization of the single-minded prosecutor. Our concern is not that an Independent Counsel will maliciously embark on a personal vendetta or will deliberately engage in gross misconduct. The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel—specifically, her isolation from the Executive Branch and the internal checks and balances it supplies—is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.

2. Unlike the Department of Justice, the Office of Independent Counsel lacks what is often called an institutional memory. It has no stock of knowledge of previous criminal prosecutors with which to compare the matter assigned to it. Such an institutional memory is an invaluable asset in making a sound judgment about the effects of a prosecutorial decision on both individuals and other government interests.

We noted above that in the course of an investigation and prosecution, a prosecutor makes many discretionary decisions that can have a powerful effect on both the individuals caught up in the investigation and the gov-

ernment's long-term law enforcement interests. The officials responsible for a prosecution must decide, for example, whether they have crossed the line that separates thoroughness from the unfair pursuit of an individual. They must also decide such questions as whether they are using a particular tactic so aggressively, or are seeking such a strained interpretation of a statute, that they are likely to create an unfavorable precedent that permanently hampers criminal law enforcement. In making these decisions, formal rules or guidelines are little help; such decisions must be made on the basis of the kind of wisdom and judgment that come from extensive practical experience.

In this respect, no single prosecutor can rival the accumulated wisdom and experience found in a diverse, ongoing institution. In such an institution, the whole is, in a sense, greater than the sum of its parts. An attorney who has, for example, spent a career reviewing applications for search warrants, or determining whether the government should seek review of adverse judicial decisions on issues of criminal procedure, has developed expertise and judgment that literally cannot be matched in any other way. More generally, no matter what issue arises in the course of a prosecution, there is a good likelihood that someone in the Department of Justice will have dealt with something like it at some time in the past.

The Executive Branch is structured precisely so as to take advantage of these institutional assets. That is why the Executive Branch has an internal hierarchy, mechanisms of internal review and scrutiny, and requirements of cooperation and coordination. For example, prosecutors are required to consult with other officials or to obtain permission before engaging in certain actions—such as certain means of gathering evidence, indictment under certain statutes, or any appeal of an adverse decision—

that might substantially affect individual rights or the government's long-term interests.[4]

Because the Office of Independent Counsel is cut off from the Executive Branch, it wholly lacks these important institutional advantages. Not only does the Office —an ad hoc, temporary institution—not have the institutional memory of the Department of Justice; it has no structure for taking advantage of the institutional assets that are within the Department of Justice or the Executive Branch. The Independent Counsel is, in general, not required to consult with, or seek approval of, anyone within the Department before taking a significant prosecutorial action.[5] Officials in the Department have no institutional means of keeping abreast of developments in the investigation conducted by the Independent Counsel. There are no institutionalized networks for coordination between the Office of Independent Counsel and attorneys in the Department of Justice.

The institutional advantages of the Department of Justice are especially pronounced in cases involving high government officials. These investigations present unusual problems. On the one hand, such officials should be held to a high standard of responsibility, and it is especially

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[4] See, *e.g.*, United States Attorney's Manual § 9-2.132 (enumerating statutes under which a United States Attorney may not institute a prosecution without the express authorization of the Criminal Division); *id.* § 9-2.133 (enumerating statutes under which a United States Attorney may not convene a grand jury or seek an indictment without consultation with the Criminal Division); *id.* § 9-2.161 (Attorney General's approval generally required for issuing subpoena to member of news media); *id.* § 9-2.171 (decision whether to seek review of adverse judicial decision is reserved to the Solicitor General).

[5] 28 U.S.C. 594(a) does provide that the Attorney General retains control of "those matters that specifically require the Attorney General's personal action under [18 U.S.C.] 2516," a provision regulating certain forms of electronic surveillance. This is, of course, a very narrow exception.

important that public confidence in government not be impaired. But on the other hand, cases involving high government officials can create threats to other government interests that are seldom seen in routine criminal prosecutions. Moreover, such cases can raise difficult questions about the distinction between violations of the law and legitimate governmental activity. And such cases can become focal points for intense political pressure.

The Department of Justice undoubtedly has more extensive experience in the prosecution of allegedly corrupt federal and local officials, in a politically charged atmosphere, than any other institution. The accumulated wisdom and experience of the Department of Justice is a unique asset to a prosecutor engaged in such an investigation.

An ad hoc institution like the Office of Independent Counsel will, by contrast, be confronting every one of these vexing issues for the first time, and it is likely to find itself at sea in dealing with them. It will not have developed institutionalized ways of dealing with political pressure from Congress and other sources. It will not know what weight to attach to, for example, claims of diplomatic immunity or assertions that a particular investigative measure will interfere with national security. It will not know how to assess an official's claim that what might appear to be criminal activity was in fact the vigorous performance of the duties of a public office. Issues like that arise frequently, of course, in investigations of the kind that now must be assigned to an Independent Counsel.

3. a. One of the important functions of the Department of Justice is to provide a counterweight to government agencies that pursue a single programmatic mission. Agencies charged with a specific mission—whether that mission is enforcing the securities laws, reducing expenditures on social welfare programs, or any of the scores of other tasks in which government agencies engage

—develop a certain unity of outlook. They tend to view their mission as highly important, and to be less sensitive than an outsider might be to the arguments of those who oppose their efforts. Such a unity of outlook and sense of mission should not be derided; they are an important part of establishing a sense of vigor and esprit in an agency, and they often lead to the faithful implementation of the legislature's intentions for a program. But in certain contexts these characteristics can also cause the most able and dedicated agency—if it is unchecked by an agency with a broader outlook—to commit damaging errors.

Thus, a central virtue of the role of the Department of Justice as the principal representative of the United States in litigation is that it enables the Department to correct the biases of single-mission agencies. Department of Justice attorneys often require other government agencies to moderate their positions in order to avoid wasteful and unnecessary litigation. Perhaps the most dramatic example is the one of most direct concern to this Court: every year, federal agencies with a more narrow mission ask the Solicitor General to seek review in this Court of hundreds of adverse judgments; the Solicitor General, with his broader perspective, seeks review in only a fraction of those cases.

This aspect of the Department's operations exemplifies the way in which the unitary Executive Branch functions. Under the unitary Executive established by the Framers, no agency with a narrow mission can pursue its policies without restraint. All of them must submit to the authority of higher officials who take a broader view —and ultimately to the authority of the President, who, as the single person elected by the nation as a whole, has the broadest view.

b. The Office of Independent Counsel is the quintessential single-mission agency. But until it brings an indictment and forces a defendant to withstand a trial, it is not subject to any review by an official or agency with

a broader perspective. Moreover, the Office of Independent Counsel is a single-mission agency in an area—highly publicized, politically charged criminal prosecutions—where such an agency is least appropriate.

The single-mission nature of the Office of Independent Counsel derives from several sources. The Office is brought together on a temporary basis for one task—to pursue one or a few alleged suspects. Its sense of mission is bound to be heightened by the fact that it operates in the most adversarial context known to our law. In addition, during the crucial investigative stages of the case, it operates essentially on an ex parte basis: it seldom, if ever, goes before an impartial judge who will require it to consider the point of view of the other side. In these circumstances, it would be entirely natural for the Independent Counsel to lose perspective and exaggerate the importance of its mission. And when it does so, there are no countervailing forces—no superior, no competing law enforcement interests, no other Executive Branch Departments—available to correct it.

The temporary nature of the Office of Independent Counsel exacerbates this problem in two important respects. First, it ensures that the investigations conducted by the Independent Counsel will be highly publicized. An ongoing component of the Executive Branch can add another investigation to its docket without attracting public attention. The Independent Counsel provisions theoretically permit the appointment of an Independent Counsel without notice to the public (28 U.S.C. 593(b)), but as a practical matter it is simply impossible to establish an entire investigative office, with a new supervisor and a new staff, to investigate a high government official, without attracting enormous public attention. Thus, the separation of the Independent Counsel from the Executive Branch necessarily casts aside one of the most decent traditions of our criminal law system—the tradition that

allegations of wrongdoing are not made public until a grand jury has found probable cause to believe them true.

Second, the temporary nature of the Independent Counsel's position skews the incentives of those who hold that office. In an ongoing, multi-function institution like the Department of Justice, no individual's career is likely to depend entirely on a single assignment. However a particular case is concluded, there will always be another matter waiting. The Independent Counsel, by contrast, has no such diversity of incentives. Her government career consists of one very highly-publicized case, probably with political overtones.

It would be surprising if that institutional arrangement did not skew the Independent Counsel's incentives. She has every reason to pursue an investigation with undue thoroughness; she has no comparable incentive to err on the side of terminating an investigation quickly. She has an incentive to seek an indictment and bring an individual to trial, instead of risking public condemnation for dropping a politically popular charge. We do not question the ability of the individuals who have served as Independent Counsel. But "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, 106 S. Ct. at 3191. The effect of the Independent Counsel's institutional position on her incentives therefore cannot be overlooked.

4. Finally, because of her isolation from the Executive Branch, the Independent Counsel is cut off from Executive Branch officials who might alert her to the danger that she is damaging other important government interests. The prosecution of criminal cases is, of course, only one of the responsibilities of the Executive Branch. Experience has shown that allegations of criminal wrongdoing by high Executive Branch officials often arise out of actions they took while attempting to discharge these other Executive Branch responsibilities.

Because the jurisdiction of the Independent Counsel is confined principally to high government officials, the Independent Counsel's operations can be expected to impinge on the other interests and responsibilities of the Executive Branch in a significant percentage of cases. But the Independent Counsel, unlike the Department of Justice, has no institutional means of taking these interests into account. Because it is a temporary, ad hoc institution that is isolated from the Executive Branch, the Office of Independent Counsel has no established relationships, formal or informal, with any Executive Branch Department, and it is likely to have deficient knowledge of their operations.

For example, it is not always apparent when, in the course of a complex criminal investigation, an issue has arisen that implicates the interests of other Departments. Because of its experience and its institutional ties to other Departments, the Department of Justice is equipped to recognize such issues; the Office of Independent Counsel is not. Once such an issue has been identified, the Department of Justice has developed means of bringing other Departments into its deliberations in a way that permits the various interests to be compromised and accommodated without confrontation. The Office of Independent Counsel has no opportunity to devolp such mechanisms. Moreover, the Department of Justice has experience in weighing the interests that other Departments assert. Because of its ongoing, institutional role in the Executive Branch, it will have a sense of when the claims of other Departments are exaggerated and when they are entitled to deference. The Office of Independent Counsel, with its one-time, exclusively prosecutorial mission, is unlikely to develop this capacity.

These institutional differences between the Department of Justice and the Office of Independent Counsel are especially pronounced, and especially troublesome, in connection with questions concerning national security and foreign affairs. Because of the importance and ubiquity

of such questions in the government today, they will arise with some frequency in matters referred to the Independent Counsel. These questions are specialized and sensitive, and it is often difficult to resolve the competing claims.

Officials who are primarily concerned with national security and diplomacy have a sharply different orientation from prosecutors. Such officials often do not share the perspective that so strongly emphasizes the importance of law enforcement and the pursuit of alleged wrongdoers. Prosecutors, on the other hand, are not schooled in the nuances of relations among nations. They are likely to discount the long-term and remote consequences in which the Departments of State and Defense must deal. Prosecutors may not fully understand, for example, the extent to which a nation must not permit certain matters to be publicized in the way that a criminal investigation would inevitably publicize them.

The Executive Branch has institutional ways of resolving issues that arise in such cases. It has institutional arrangements, formal and informal, for discussions at various bureaucratic levels and ultimately mediation by the Cffice of the President if necessary. The Independent Counsel has nothing comparable. Its resolution of these issues is therefore likely to be far less well-informed, and far more confrontational.

The Framers assigned to the President the responsibility to take care that the laws be faithfully executed. They of course intended that *all* the laws be faithfully executed. Whatever the theoretical rationale of the Independent Counsel provisions, their practical effect is to single out one Executive Branch function—the prosecution of certain high officials—and to give that function a priority. That task alone is insulated from other, potentially competing interests that the President is charged with protecting. In this way, the Independent Counsel

provisions, on the most practical level, undermine the Framers' design.

C. The Limited Statutory Provisions for Control of the Independent Counsel Do Not Alleviate These Problems.

Appellant and her supporting amici contend that—notwithstanding the principle of the Independent Counsel provisions (and indeed appellant's title)—the Independtant Counsel is in fact not independent of the internal controls of the Department of Justice. In effect, their contention is that the Independent Counsel is independent only in desirable ways, not in ways that interfere with the interests that the Framers sought to protect when they decided upon a unitary Executive Branch. Not surprisingly, this Panglossian view is incorrect. Appellant's arguments do not take into account the realities of the administration of the Independent Counsel provisions.

1. Appellant relies first on 28 U.S.C. 592, which governs the Attorney General's role in the appointment of the Independent Counsel. Appellant asserts that the Attorney General retains "complete power over the initiation of the statutory process" (Br. 19).

This assertion is simply mistaken. The Independent Counsel provisions impose tight controls on the Attorney General's discretion. Indeed, that is part of their very purpose.[6] Far from retaining complete control, the Attorney General has a mandatory duty to seek the appointment of an Independent Counsel in certain circumstances. See 28 U.S.C. 592(c). Courts of appeals have held that the Attorney General's decision not to seek the appoint-

[6] Notably, another provision, 28 U.S.C. 591(c), provides the Attorney General with an option to seek the appointment of an Independent Counsel in certain circumstances. This is further confirmation of a point that is in any event clear from the language of the statute—that the provision under which appellant was appointed, 28 U.S.C. 592, is not optional but imposes a duty on the Attorney General.

ment is not subject to judicial review;[7] but it remains a legal duty, and it goes without saying that Attorneys General have taken it very seriously.

This mandatory duty arises unless the Attorney General determines, on the basis of a "preliminary investigation," that there are not even "reasonable grounds to believe that further investigation or prosecution is warranted" in a particular case. 28 U.S.C. 592(b)(1), (c)(1). The Attorney General must make this determination after an extremely brief and superficial investigation. The statute requires the Attorney General to make the determination within 90 days after receiving the information that triggers the preliminary investigation (28 U.S.C. 592(a)(1)), and it specifically disables the Attorney General from using many of the tools that any prosecutor would use to get to the truth of a matter: he is denied authority to "convene grand juries, plea bargain, grant immunity, or issue subpoenas" (28 U.S.C. 592(a)(2)). Thus, unless the Attorney General can determine, after a brief and superficial investigation, that there are not even "reasonable grounds [for] . . . further investigation," he must seek the appointment of an Independent Counsel.

This scheme gives the Attorney General little real control over the decision whether to initiate an investigation by the Independent Counsel. The Attorney General will be able to identify patently frivolous allegations. There is, however, a very substantial class of allegations that cannot be dismissed without a significant degree of investigation but that turn out to be utterly meritless. In those cases the Attorney General is, in practical effect, deprived of all control over the prosecutorial process. He must seek the appointment of an Independent Counsel, and the entire Independent Counsel apparatus will be brought to bear on one defendant.

[7] *Dellums v. Smith*, 797 F.2d 817, 818 (9th Cir. 1986); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

2. Appellant also relies on 28 U.S.C. 594(f), which provides that the Independent Counsel "shall, except where not possible, comply with written or other established policies of the Department of Justice respecting enforcement of the criminal laws." Appellant suggests (Br. 19-20) that this provision ensures that an Independent Counsel's investigation will be little different from what a Department of Justice investigation, free of political influence, would have been.

This contention is erroneous on two levels. First, it falsely assumes that a criminal investigation is shaped by formal rules written out in manuals. The crucial judgments that a prosecutor makes—judgments about which investigative techniques to employ, how much resources to expend in the investigation, when to grant immunity, when to plea bargain, whether to indict—cannot be reduced to a collection of rules. Any established rules and policies must necessarily leave enormous scope to a prosecutor's judgment and discretion. The exercise of this discretion will be governed not by formal rules but by experience and institutional environment; and as we have explained, it is the institutional environment of the Independent Counsel that introduces biases and distortions into the discretionary judgments she must make.

More fundamentally, the decision at the core of prosecutorial discretion—whether a particular case is a suitable one for the application of the criminal laws at all, or should instead be viewed as a political or an internal disciplinary matter—is plainly not a decision that can be made in accordance with formal rules. It is sometimes a decision that requires considering all the responsibilities of the Executive Branch. As a knowledeable observer has explained, while "ordinary" criminal prosecutions do not present questions that concern the President or other high officials, there is a significant class of cases in which "the decision of what legal theory to press on the court, what interpretation of the statute to

urge, what settlement, perhaps, to adopt, is just as much dependent upon one's policy preferences as it is upon one's judgment as to the facts and law books read in the way a lawyer does . . . . [T]he President should have the power and responsibility for making these decisions . . . or at least should have someone who is attuned to his philosophy of government making them." *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess 202 (1974) (statement of Archibald Cox).

3. Appellant further argues (Br. 20-21) that the Independent Counsel will not be cut off from the institutional resources of the Department of Justice because she can "request assistance from the Department," which, under the statute, the Department "shall provide" (28 U.S.C. 594(d)). This argument is unrealistic, in several respects. First, this provision contains no requirement that the Independent Counsel consult the Department of Justice. It is unlikely that an Independent Counsel, who has been appointed precisely so that the Department will not conduct the investigation, would risk the public outcry that might result if she were consistently governed by the Department's judgment on significant issues relating to the investigation.

Perhaps most important, even if the Independent Counsel were to ask the advice of Department of Justice officials on important issues, it is unlikely that they would be able to give her useful guidance. That is because Department officials will have had no contact with the investigation as it progressed. All background information about the investigation is localized in the Office of Independent Counsel. Department of Justice officials will not be in a position not to know the background of factual developments and previous tactical decisions that must inform any prosecutor's judgment. They will be able to participate only in isolated aspects of the investi-

gation, taken out of context. In these circumstances, the Department of Justice officials could not, realistically, have any significant impact on the Independent Counsel's investigation.[8]

4. Finally, appellant suggests that 28 U.S.C. 596(a), which provides that the Attorney General may remove the Independent Counsel "for good cause," protects against the kinds of biases and distortions we have described. Br. 19. This argument is incorrect for many reasons. To begin with, the contours of the "good cause" requirement are not well established in the law. It is by no means clear, for example, that even multiple egregious errors of judgment or a pattern of abusive acts (short of legal wrongdoing) would constitute good cause. But in addition, appellant's argument overlooks two relatively subtle but extremely important practical aspects of the removal power.

First, as a practical matter, the most serious problems created by the Independent Counsel provisions—the dangers of excessive zeal and single-mindedness, of loss of perspective and errors of judgment, of interference with other responsibilities of the Executive Branch—cannot be dealt with by removal or threats of removal. Removal is an ultimate weapon, rarely used or even threatened. On the practical, day-to-day level, the great power of prosecutors is effectively controlled by more subtle means—by socializing them into the internal culture of the Department of Justice; by pointing out their errors; by persuading them to change course; by overruling them on specific,

[8] This lack of information will also make it practically impossible for Department of Justice officials to monitor the Independent Counsel's use of resources. As we noted (page 11, *supra*), under 28 U.S.C. 594(d) the Department of Justice is required to supply the Independent Counsel with "the resources and personnel necessary to perform [her] duties." Even assuming that the statute permits the Department to play a role in determining what resources are "necessary," Department officials, cut off from knowledge about the progress of the investigation, will be in no position to make such a determination.

narrow issues. These are the devices that actually influence the way prosecutors use their discretion. They are, of course, precisely the devices that the Independent Counsel provisions foreclose to the Attorney General.

Second, appellant's suggestion that the Attorney General can use the removal power to protect against the dangers of the Independent Counsel provisions assumes, again, that the Attorney General is in a position to evaluate the Independent Counsel's decisions. In fact, as we explained, because the Office of Independent Counsel controls all the information developed in the course of the investigation, the Attorney General will be unacquainted with the background against which the Independent Counsel makes her decisions. Consequently, the Attorney General will seldom be able to determine whether a specific decision made by the Independent Counsel was within the bounds of reasonable discretion.[9]

D. There Are Alternative Ways to Protect Criminal Prosecutions From Political Interference Without Compromising the Integrity of the Executive Branch.

We of course agree with the goal of the Independent Counsel provisions. Wrongdoing by high government officials should not be countenanced; allegations of wrongdoing should be investigated vigorously and fairly. But the flexible scheme of separation of powers designed by the Framers is more than equal to this task. There are ample ways to protect the independence of a criminal in-

[9] In addition, of course, the political costs of dismissing an Independent Counsel make it unlikely that an Attorney General could take that step for anything short of the most extreme wrongdoing. We emphasize in this connection that the political costs of dismissing a prosecutor investigating high government officials are an important aspect of the constitutional system of checks and balances and democratic accountability. But those costs will be incurred if the Attorney General attempts to dismiss a prosecutor who is within the Executive Branch and subject to dismissal at will. There is no sufficient reason for the additional insulation provided by the Independent Counsel provisions.

vestigation from political interference without going to the lengths of the Independent Counsel provisions.

For example, the Constitution permits Congress to require the advice and consent of the Senate to the appointment of an officer comparable to an Independent Counsel. Senatorial confirmation would help ensure that the appointment was not made for partisan reasons; it is not necessary to deny the President the power of appointment or to isolate the Independent Counsel from the Executive Branch. Or Congress might, if it believed that a special prosecutor was necessary, specify a term of office that would help ensure that the appointment was not made with a specific case in mind. Congress can provide that the term will overlap different Presidential terms, thus further reducing the risk of partisanship. Congress has the option, under the Constitution, of establishing an Independent Counsel who is not within the Department of Justice, if it considers that course desirable.

Thus Congress, if it believes that some form of special prosecutor is needed, has available to it a number of options that do not conflict with the Framers' design and therefore do not produce the severe institutional distortions of the current Independent Counsel provisions. An office inside the Executive Branch would be within the network of intra-Branch and intra-Department checks and balances; it would develop an institutional memory and sense of perspective; it would not institutionalize the single-minded focus on a particular defendant that is characteristic of the current system. It would develop institutional means of accommodating the responsibilities and interests of other components of the Executive Branch.

Any institutional arrangement designed to handle such a sensitive task as the prosecution of high-ranking government officials will have potential weaknesses. The great error of the current Independent Counsel provisions is their exclusive focus on one concern—the risk of improper influence—and their disregard of the perhaps more subtle but very serious practical problems we have described. One of the deepest commitments of the Framers was that no official should exercise discretionary power unchecked by institutional restraints. The Independent Counsel provisions are not consistent with that commitment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

"THE FEDERAL PROSECUTOR"

An Address

by

ROBERT H. JACKSON,
Attorney General of the United States

Delivered at

The Second Annual Conference of
United States Attorneys

Great Hall
Department of Justice Building
Washington, D.C.

April 1, 1940
10 A.M.

THE FEDERAL PROSECUTOR

It would probab'y be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to

win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of federal prosecutor.

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be suspended in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his conduct with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an Act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal

prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called "the shadow cast by one's daily life." Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.

The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics.

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

In times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called "subversive activities." They are dangerous to civil liberty because the prosecutor has no definite standards to determine what constitutes a "subversive activity," such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as "subversive" the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat" were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.

In the enforcement of laws which protect our national integrity and existence, we should prosecute any and every *act* of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are concerned only with the prosecution of acts which the Congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely. The same variation of attitudes towards other law-enforcement problems exists. The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.